85-1884

No. .....

Supreme Court, U.S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1985

HUNT INTERNATIONAL RESOURCES CORPORATION, GREAT WESTERN UNITED CORPORATION, THE GREAT WESTERN SUGAR COMPANY, WESTERN INVESTMENT COMPANY, N. BUNKER HUNT AND W. HERBERT HUNT,
Petitioners,

VS.

W. C. AND KENNETH STREY, a partnership on behalf of itself and all others similarly situated,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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May 13, 1986

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QUESTION PRESENTED

Where it is determined to a legal certainty that a plaintiff cannot recover punitive damages, can his prayer for punitive damages nevertheless be counted toward satisfying the amount in controversy requirement for diversity jurisdiction?

PARTIES TO THE PROCEEDINGS

Petitioners are Hunt International Resources Corporation, Great Western United Corporation, The Great Western Sugar Company, Western Investment Company, N. Bunker Hunt and W. Herbert Hunt, all included in the caption. Petitioners have no further parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1. Respondent W. C. and Kenneth Strey, a partnership, represents a class of approximately 3,000 sugarbeet growers residing in Colorado, Kansas, Nebraska, Wyoming and Montana.

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Petitioners,

VS.

W. C. and KENNETH STREY, a partnership on behalf of itself and all others similarly situated,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners, defendants below, petition this Court to issue a writ of certiorari to review the decision of the Tenth Circuit Court of Appeals filed on December 4, 1984 which held that, in a class action, the district court had diversity jurisdiction over claims of class members with less than $10,000 actual damages in controversy. In an opinion at odds with the opinions of this Court and other circuits, the Court of Appeals held that plaintiff's prayer for $250 million in punitive damages could be counted in determining the amount in controversy although holding, as a matter of law, that no punitive damages could be recovered at trial. A Petition for Rehearing and a Peti-

tion for Rehearing *En Banc* were denied on February 12, 1986.

OPINIONS BELOW

The pertinent order of the District Court for the District of Colorado was orally delivered in open court and is appended at A-1. The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 749 F.2d 1437 (10th Cir. 1984) and is appended at A-2. The Order denying the Petition for Rehearing and Petition for Rehearing *En Banc* is unpublished and is appended at A-3.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit entered judgment on December 4, 1984. A timely Petition for Rehearing and Rehearing *En Banc* was denied on February 12, 1986. This Petition was filed within ninety days of the denial of rehearing in accordance with 28 U.S.C. § 1254(1) and 28 U.S.C. § 1201(c). The district court asserted jurisdiction below under 28 U.S.C. § 1332(a)(1) over claims of all class members who had $10,000 in controversy when taking into account plaintiff's prayer for $250 million in punitive damages. Defendants contested jurisdiction as to class members who had less than $10,000 actual damages in controversy — approximately two-thirds of the class — on the ground that punitive damages could not be recovered as a matter of law and, accordingly, should not be counted toward satisfying the amount in controversy requirement.

STATUTE INVOLVED

28 U.S.C. § 1332(a)(1) provides in pertinent part as follows:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between —
>
> (1) Citizens of different States; . . . .

STATEMENT OF THE CASE

This action concerns the 1974 sugarbeet contracts under which The Great Western Sugar Company ("GWS") purchased sugarbeets from approximately 3,000 sugarbeet growers residing in Colorado, Kansas, Nebraska, Wyoming and Montana. Under the sugarbeet contracts, the price paid by GWS to sugarbeet growers for the sugarbeets is based in part on the average net return obtained by GWS on sales of refined beet sugar in the marketing year following the harvest. Under the formula in the sugarbeet contracts, the growers receive approximately 62% of the net return obtained by GWS on sales of refined beet sugar.

This class action suit was filed in the United States District Court for the District of Colorado in May 1978. At trial, the named plaintiff asserted three principal claims for relief: (1) breach of contract; (2) breach of an implied contractual duty of good faith and fair dealing; and (3) breach of fiduciary duty. The claim for breach of contract alleged that $61 million in profits made by defendants through short positions on the raw cane sugar futures market should have been counted in calculating the price to be paid by GWS to the growers under the sugarbeet contracts. Plaintiff alleged that the growers

were entitled to 62% of the futures trading profits or $38 million.

In the claim for breach of an implied contractual covenant of good faith and fair dealing, plaintiff alleged that GWS had failed to sell its beet sugar inventory in good faith, and had failed to maximize the net return from the sale of sugar. Plaintiff argued in essence that GWS had not sold the refined sugar at the best times of the year. On this claim, plaintiff sought $17 million in damages on the theory that GWS should have matched the higher average net return obtained by one of several competing sugar companies.

In the claim for breach of fiduciary duty, plaintiff alleged that the sugarbeet contracts gave rise to a fiduciary relationship. Plaintiff claimed that defendants' futures trading constituted an inherent conflict of interest because it allowed defendants to profit from declining sugar prices. On this claim, plaintiff sought disgorgement of all $61 million in futures trading profits, plus $250 million in punitive damages. Plaintiff sought punitive damages *only* on the claim for breach of fiduciary duty.

Plaintiff alleged diversity jurisdiction under 28 U.S.C. § 1332 and federal question jurisdiction under 28 U.S.C. §§ 1331 and 1337. Federal question jurisdiction was premised on plaintiff's claim for violation of the Commodity Exchange Act ("CEA"). 7 U.S.C. § 6b. The district court dismissed the CEA claim early in the case as failing to state a claim for relief. Plaintiff had not alleged any fraud in connection with the making of trades on the futures markets, and the growers were not in the class of those whom Congress intended to protect under the CEA. Dismissal of the CEA claim left diversity of citizenship as the only basis for jurisdiction.

Defendants moved the district court to dismiss the claims of two-thirds of the class for lack of subject matter jurisdiction. Defendants demonstrated that, if the growers recovered the full amount of actual damages they sought and the judgment were allocated on a pro-rata basis among the growers, approximately two-thirds of the growers would recover less than the $10,000 amount in controversy required for diversity jurisdiction. Defendants also argued that a federal court class action was not a "superior method for adjudicating the controversy" under Rule 23(b)(3) of the Federal Rules of Civil Procedure because the district court lacked subject matter jurisdiction over the claims of a majority of the class.

Plaintiff acknowledged that most growers would recover less than $10,000 in actual damages even if plaintiff recovered all actual damages sought, but argued that the prayer for $250 million in punitive damages for breach of fiduciary duty should also be counted. If the growers recovered $250 million in punitive damages plus complete recovery of all actual damages alleged, then all growers would recover $10,000. Defendants countered that the prayer for $250 million in punitive damages was made in bad faith, solely for the purpose of acquiring federal jurisdiction. Defendants also argued that, as a matter of law, the sugarbeet contracts did not create a fiduciary relationship and, therefore, the claim for breach of fiduciary duty should be dismissed. In that event, only breach of contract claims would remain and no punitive damages could be recovered.

Acknowledging that each class member needed to satisfy the amount in controversy requirement, the district court nevertheless concluded that it would count the full claim for $250 million in punitive damages for that purpose. It rejected defendants' argument that the complaint

failed to state a claim for relief on which punitive damages could be awarded. Accordingly, the district court exercised jurisdiction over the claims of all growers who grew at least 10 acres of sugarbeets under a 1974 sugarbeet contract.

The case was tried to a jury which rendered a verdict for defendants on the breach of contract claim, finding that the growers had no contractual right to share in defendants' futures trading profits. The jury nonetheless found for the plaintiff class on the claims for breach of fiduciary duty and breach of an implied contractual duty of good faith and fair dealing. The jury awarded the class $11,813,748 in actual damages and $13,571,388 in punitive damages. The district court added an additional $5,909,808 in prejudgment interest — making a total of $31,294,944 — and entered judgment on the jury's verdict.

On appeal, the Court of Appeals in a unanimous opinion vacated the judgment and remanded for a new trial only on the claim for breach of an implied contractual duty of good faith and fair dealing. The Court of Appeals held that, as a matter of law, plaintiff had not stated any claim for breach of fiduciary duty and that the district court should have directed a verdict for defendants on that issue. 749 F.2d at 1440. The Court of Appeals reasoned that the sugarbeet contracts "were typical sales contracts with the ultimate price to be determined by post-sale events." 749 F.2d at 1439. Title to the sugarbeets passed to GWS on delivery, the growers had no ownership interest in the beets thereafter nor in the sugar, and the

growers were simply creditors of GWS for the purchase price. *Id.* The Court of Appeals concluded:

> The contract was, as mentioned, nothing more than a sales contract with a long used formula for the computation of price. GWS held no property of the plaintiffs, but was at most a creditor [SIC] for the unpaid portion of the sales price.

Id. at 1440.[1]

With respect to the claim for breach of an implied contractual duty of good faith, the Court of Appeals held that the district court had erroneously instructed the jury. Accordingly, it ordered a new trial on that claim alone.

Despite these holdings, the Court of Appeals rejected defendants' argument that the district court lacked subject matter jurisdiction over two-thirds of the class in light of the legal certainty that punitive damages were unavailable. Its reasoning on this issue was limited to the following:

> We hold that at the time the case was commenced the court had jurisdiction. An adjustment of the dollar figures during the proceedings did not divest the court of jurisdiction.
>
> Upon close scrutiny there is nothing to show that the punitive damages claim was not made in good faith under *St. Paul Mercury Indemnity Co. v. Red*

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[1]In addition, the Court of Appeals noted that the plaintiff stipulated before trial that it had no evidence that defendants' futures trading had any effect on the cash market for sugar and that it had no evidence that GWS pricing decisions had any effect on the futures market. The futures trading thus presented no conflict of interest. *Id.* at 1439-40.

Cab Co., 303 U. S. 283, 58 S. Ct. 586, 82 L.Ed. 845; *Palmer v. A. H. Robins Co., Inc.* 684 P.2d 187 (Colo.).

749 F.2d at 1441. The case has been remanded to the district court which has scheduled a retrial for March 9, 1987 — a retrial at which, even if plaintiff recovered its entire prayer for relief, approximately two-thirds of the class members will not recover $10,000.

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE TENTH CIRCUIT IS IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS ON AN IMPORTANT AND RECURRING QUESTION OF FEDERAL JURISDICTION

In essence, the Tenth Circuit Court of Appeals decided in this case that, because plaintiff was in subjective good faith in advancing the legal argument that the sugarbeet contract created a fiduciary relationship, the court could count the accompanying prayer for punitive damages for purposes of calculating the amount in controversy even though the Court of Appeals had rejected plaintiff's legal argument and had determined, as a matter of law, that the sugarbeet contract did not give rise to any fiduciary duty and no punitive damages could be recovered.

This holding misapplies this Court's precedents on an important issue of federal jurisdiction and is in conflict with the decisions of other Courts of Appeals. The Tenth Circuit's approach is an open invitation to use invalid punitive damage claims to force what are essentially state court actions into federal court.

In *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283 (1938), the Court established the following rules for determining whether the amount in controversy re-

quirement for diversity jurisdiction has been satisfied. First, where "from the face of the pleadings, it is apparent, to a legal certainty, that the plaintiff cannot recover the amount claimed," the suit should be dismissed for lack of jurisdiction. 303 U.S. at 289. Further, where "from the proofs, the court is satisfied to a like certainty that the plaintiff never was entitled to recover that amount," the suit must also be dismissed for lack of jurisdiction. *Id.* Finally, if it is not possible to determine to a "legal certainty" that the plaintiff cannot recover the jurisdictional amount, the district court has jurisdiction so long as the plaintiff's claim is made in "good faith." *Id.* As the Court stated,

> unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith.

303 U.S. at 288. Resort to a "good faith" assessment is thus necessary only when "legal certainty" is not present.

The proper application of the Court's holding in *St. Paul* is exemplified by *Wiggins v. North American Equit. Life Assurance Co.*, 644 F.2d 1014 (4th Cir. 1981). There, the plaintiff brought suit for $9,000 in actual damages allegedly due her under a title insurance policy. She also sought $100,000 in punitive damages for the insurance company's alleged bad faith in refusing to pay her claim.

The district court held that punitive damages were unavailable under the applicable state law, but retained jurisdiction over the case on the theory that the plaintiff's legal arguments to the contrary were made in good faith. On appeal after trial, the Fourth Circuit reversed, holding that the district court lacked jurisdiction because, "as a matter of 'legal certainty'," plaintiff never could have recovered punitive damages. 644 F.2d at 1018. The fact

that the plaintiff may have been in subjective good faith in arguing that state law allowed the recovery of punitive damages was irrelevant:

> [W]hile good faith is a salient factor, it alone does not control, for if it appears to a legal certainty that the plaintiff could not recover the jurisdictional amount, the case will be dismissed for want of jurisdiction. . . .

644 F.2d at 1017 (*quoting McDonald v. Patton*, 240 F.2d 424, 426 (4th Cir. 1957)).[2]

Some courts have noted the particular importance of applying the legal certainty test in cases where, as here, plaintiff relies on punitive or exemplary damages to attain the jurisdictional amount. As the Court of Appeals for the District of Columbia Circuit has stated:

> In applying the legal certainty test where the availability of punitive damages is the sine qua non of federal jurisdiction the District Court should scrutinize the punitive damage claim to ensure that it has at least a colorable basis in law *and* fact. *See Zahn v. International Paper Co.*, 469 F.2d 1033 n.1 (2d Cir.

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[2] *Accord Nixon v. Loyal Order of Moose Lodge No. 750*, 285 F.2d 250 (4th Cir. 1960). *See also Burns v. Anderson*, 502 F.2d 970, 971-72 (5th Cir. 1974) (Federal courts must not "function as small claims courts"; trial judge must dismiss case if claim is for less than $10,000 as matter of law); *Wood v. Citronelle-Mobile Gathering System Co.*, 409 F.2d 367 (5th Cir. 1968) (case must be dismissed where punitive damages essential to meeting jurisdictional amount are unavailable as a matter of law); *Ringsby Truck Lines, Inc. v. Beardsley*, 331 F.2d 14, 18-19 (8th Cir. 1964) (exemplary damages unavailable as matter of law; case dismissed); *Morris v. Hotel Rivera, Inc.*, 704 F.2d 1113, 1115 (9th Cir. 1983) ("typical" case meeting legal certainty test is where "rule of law or measure of damages limits amount of damages recoverable").

> 1972), *aff'd,* 414 U.S. 291 (1973); *Nelson v. Keefer,* 451 F.2d 289, 293-93 (3d Cir. 1971). Liberal pleading rules are not a license for plaintiffs to shoehorn essentially local actions into federal court through extravagant or invalid punitive damage claims.

Kahal v. J.W. Wilson & Assoc., Inc., 673 F.2d 547, 549 (D.C. Cir. 1982).

In contrast, the Tenth Circuit repeatedly has allowed district courts to assert jurisdiction over cases despite the legal certainty that the plaintiff cannot recover the requisite amount in controversy. Misapplying the "good faith" test to the exclusion of "legal certainty," the Tenth Circuit has held that a district court had jurisdiction even where it is determined as a matter of law that the plaintiff cannot recover $10,000 — if the plaintiff's rejected legal arguments to the contrary were made in subjective good faith. The Tenth Circuit's approach encourages the manufacture or inflation of punitive damage claims to bootstrap what are essentially local actions into federal court.

The present case is only the most recent in a series of cases in which the Tenth Circuit has misapplied the "good faith" test. In *Farmers Elevator Mutual Insurance Co. v. Jewett,* 394 F.2d 896, 898 (10th Cir. 1968), for example, the Tenth Circuit turned the rule on its head, reasoning that jurisdiction was present because "we cannot say to a 'legal certainty' that 'good faith' was lacking . . . ." In *Craig v. Champlin Petroleum Co.,* 421 F.2d 236 (10th Cir. 1970), lease holders brought a class action for amounts allegedly due under oil and gas leases based on a claim that the lessor had not properly marketed the oil extracted under the leases. The claims of individual class members were for amounts less than $10,000, but plaintiff had amended the complaint to seek cancellation of the leases, each of which had a value in excess of $10,000. The

district court determined that, as a matter of law, lease cancellation was not a proper remedy for the lessor's alleged failure to market properly, but nevertheless upheld diversity jurisdiction. On appeal, the Court of Appeals affirmed on the ground that the royalty owners had been in good faith in advancing the legal argument that lease cancellation was an appropriate remedy. 421 F.2d at 240.[3]

The Tenth Circuit's confusion over the applicable standard is most apparent in its opinion in the present case. Here, as noted *supra*, plaintiff alleged that defendants had a fiduciary duty to sugarbeet growers arising out of their contractual relationship. The complaint prayed for $250 million in punitive damages on the fiduciary duty claim — an amount approximately eight times the prayer for actual damages. The punitive damage allegation on

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[3]Decisions of the Sixth Circuit appear also to allow federal courts to assert diversity jurisdiction based on a claim for punitive damages even where it is legally certain that a plaintiff cannot recover punitive damages, providing the court decides that plaintiff's legal argument was made in subjective good faith. *See Lewis v. Cook*, 409 F.2d 619 (6th Cir. 1969) (jurisdiction will not attach only where claim made merely for purpose of conferring jurisdiction); *Scottish Union v. National Ins. Co. v. Bejcy*, 201 F.2d 163 (6th Cir. 1953) (court finds jurisdiction because plaintiffs had a "good faith reasonable expectation" when case filed despite fact that they were wrong, as a matter of law); *Calhoun v. Kentucky-West Virginia Gas Co.*, 166 F.2d 530 (6th Cir. 1948) (court finds jurisdiction without resolving legal question because at the time of filing there was "room for the inference" that requisite damages were available). *See also Worthams v. Atlanta Life Ins. Co.*, 533 F.2d 994 (6th Cir. 1976) (case not dismissed despite legal certainty that jurisdictional amount could not be recovered because claim "not revealed to be clearly colorable from an examination of the complaint itself.") *Cf. Sellars v. O'Connell*, 701 F.2d 575 (6th Cir. 1983) (dissent).

the fiduciary duty claim was essential to obtaining federal jurisdiction.

In the district court, defendants had argued that Colorado law did not recognize any fiduciary relationship arising from an ordinary commercial contract and that, in any event, the plaintiff had inflated the punitive damage claim so as to obtain federal jurisdiction. On these grounds, defendants moved for dismissal of the action as to growers with less than $10,000 actual damages in controversy (about two-thirds of the class). The district court rejected these arguments and allowed the case to proceed as to the entire class. On appeal, the Tenth Circuit reversed, holding that Colorado law did not recognize a fiduciary duty arising out of an ordinary commercial contract. Despite ruling that the class therefore could not recover punitive damages, the Court of Appeals nonetheless allowed the class to use the punitive damage claim to make its way into federal court on the remaining breach of contract claim because of plaintiff's "good faith" in advancing the legally incorrect claim.

This anomalous result is also at odds with this Court's ruling in *Zahn v. International Paper Co.*, 414 U.S. 291 (1973). There the Court held that in a class action for damages each class member must satisfy the amount in controversy requirement. The court specifically held that "any plaintiff without the jurisdictional amount must be dismissed." 414 U.S. at 300.

The decision below circumvents the "legal certainty" and "good faith" tests as established in *St Paul Mercury Indemnity Co. v. Red Cab Co.* and adhered to by most Courts of Appeals. This Court has never suggested that, so long as a plaintiff makes a good faith legal argument for punitive damages, the prayer for punitive damages can be counted toward jurisdiction even if the court

determines, as a matter of law, that plaintiff has stated no valid claim for such damages. Unless corrected by this Court, the Court of Appeals' ruling will remain an open invitation for plaintiffs to use legally invalid punitive damage claims to "shoehorn" their state law actions into federal court. At a time when federal courts are burdened with ever-expanding caseloads, such misuse of federal diversity jurisdiction should not remain unchecked.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: May 13, 1986

Respectfully Submitted,

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APPENDIX A-1

Case No.: D.C. No. 78-Z-0450

DISTRICT COURT OPINION RE: JURISDICTION

REPORTER'S TRANSCRIPT

(Hearing on class certification)

Proceedings before the Honorable Zita L. Weinshienk, Judge, United States District Court for the District of Colorado, May 8, 1980, United States Courthouse, Denver, Colorado.

(Transcript, pp. 96-98)

Page 96:

* * *

On the question of the $10,000 limitation, I would have to agree with the defendants that the *Zahn* case, although it talks about a (b)(3) action, probably philosophically covers class actions including (b)(1)'s; and therefore, the *Zahn* decision as held by Judge Winner in the *Davis* case, does require that each member of the class have a claim of $10,000 or more. It also, at least by implication, indicates that there is no ancillary jurisdiction for those with lesser claims; so the question in this case gets down to the punitive damages and whether they are proper parts of the claim and whether these claims bring the amounts of the individual class members over the $10,000 requirement.

I can't go into the facts at this time as to whether this is a proper punitive-damage claim or not. I would not even dare to try to guess before hearing evidence whether there is a proper claim. I certainly do not have that type of legal certainty that was discussed in one of the cases that there is no punitive-damage claim in this case. I do

not have a legal certainty that there is no punitive-damage claim in this case.

* * *

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* * *

Therefore, the decision of the punitive-damage claim in this case does allow at least the *prima-facie* showing of the statutory amount of $10,000 as to everyone that has ten acres or more, and that takes care of that jurisdictional question.

Whether punitive damages can be maintained when we get into the facts is something that I am not going to speculate about at this time.

APPENDIX A-2

W.C. and KENNETH STREY, a partnership, on behalf of itself and all others similarly situated, Plaintiffs, Appellees, Cross-Appellants,

v.

HUNT INTERNATIONAL RESOURCES CORPORATION, a Delaware corporation; Great Western United Corporation, a Delaware corporation; the Great Western Sugar Company, a Delaware corporation; Western Investment Company, a Delaware corporation; N. Bunker Hunt and W. Herbert Hunt, Defendants, Appellants, Cross-Appellees.

Nos. 84-1344, 84-1398.

United States Court of Appeals,
Tenth Circuit.

Dec. 4, 1984.

Before SETH, BREITENSTEIN and DOYLE, Circuit Judges.

SETH, Circuit Judge.

The plaintiffs herein are several thousand sugar beet growers who had entered into contracts wiht Great Western Sugar (GWS) for the sale of their beet crop. The growers are organized into regional growers' associations. Sales contracts would be negotiated each year whereby the growers agreed to deliver and sell their crop to GWS. There was no continuing year to year obligation on either party and the record shows that the growers increased or decreased the portion of their land they wished to plant in beets from year to year or raised none at all. On delivery of beets to GWS by the growers the sale was completed and the seller was paid a portion of the ultimate price.

His beets were tested for sugar content on delivery. The balance of the purchase price was paid by GWS at the end of its sales year for refined sugar. The total contract price was fixed by a formula which determined the "average net return" to GWS on sales of its refined sugar for the sales period. There were historically derived deductions and factors in the formula for the price determination. No issue is presented as to the formula.

The sales contracts recite that the growers are independent contractors. The record demonstrates, and the witnesses acknowledged, that the growers were creditors of GWS for the balance of the purchase price, that title to the sugar beets passed to GWS on delivery, and that the growers had no ownership in the beets thereafter nor in the sugar.

The contracts were typical sales contracts with the ultimate price to be determined by post-sale events. Such contracts which depend for pricing upon market prices at an agreed future date or upon profits or returns to one of the parties are not unusual. Such agreements are common in the oil and gas business, in store leases, and licensing agreements.

There was a change in the ownership of Great Western Sugar about the time the sugar beet crops were delivered to the plants under the contracts in question. The new owners decided to engage in trading in the futures market for sugar and other products and metals. GWS, the individuals, and a new corporation traded actively in the futures market.

The plaintiffs in this action seek to participate in the sugar futures profits of defendants which resulted but not in losses. A right of participation is advanced in three main claims in the complaint. They claim that the right to

participate arose under the provisions of the contracts although not therein mentioned. They claimed that the sales contract placed a fiduciary duty on GWS to the plaintiffs. The third general claim was based on an implied duty of defendants to perform under the contract in good faith.

The plaintiffs thus claimed that under the sales contract they were entitled to a percentage of profits made by defendants in then futures trading in sugar. This claim was advanced as a right under the term of the contract. The jury however decided that no such rights could be derived from the contracts. This determination was not appealed by the plaintiffs. The futures profits were thus not to be used in the calculation of "average net return." Also, no issue remains, as was advanced by the plaintiffs, that defendants misrepresented to plaintiffs that there was no such right under the contract.

The case concerns a period when there were large fluctuations in the price of sugar with record highs. There was much testimony as to whether GWS should have hedged the inventory in the futures market to protect its future sugar sales. Also, testimony as to what would have been a hedge in these circumstances was introduced as was testimony as to whether the contracts would have permitted hedging. Hedging had never been done by GWS. There was testimony that the growers through their several organizations reached a decision, expressed to GWS, that they as growers did not want to engage in sugar futures trading in view of possible losses.

The witnesses for plaintiffs testified that GWS should have entered the futures market to hedge the inventory. The witnesses for the defendants testified that it was their view that this could not be done because the growers

could not be required under the contracts to share possible losses.

The contracts provided for certain deductions to arrive at "net average return," as above mentioned, and it is questionable whether losses from hedging could have been included.

As mentioned, the jury concluded that participation in futures trading was not provided for in the contract. Hedging in the context in which it here arose is but an aspect of futures trading. The growers did not seek to negotiate a contract which would have included futures trading and, as mentioned, decided not to participate.

One of the basic positions that both parties took going into the trial was expressed in a stipulation that in substance provided that defendants' trading in sugar futures did not affect the cash market for sugar, and GWS pricing decisions had no effect on the futures market. The accuracy of this stipulation was borne out by testimony at trial. The stipulation placed a significant limitation on the contentions of plaintiffs or suggestion that there was some conflict of interest in the defendants' futures trading and the cash sales by GWS.

The plaintiffs also argued as a separate claim, and the trial court took the position, that the sales contracts created a fiduciary duty on the part of GWS to the plaintiffs. The jury included in its award of damages an element for the breach of such a duty. However, the contract provisions do not create a fiduciary duty and the evidence showed that none otherwise existed. The contract was, as mentioned, nothing more than a sales contract with a long used formula for the computation of price. GWS held no property of the plaintiffs, but was at most a creditor for the unpaid portion of the sales price.

GWS had the same interest in the "average net return" as did the plaintiffs.

As mentioned, the parties stipulated that the futures trading by defendants had no effect on the cash market for sugar and GWS pricing decisions had no effect on the futures market. There was demonstrated no conflict of interest on the part of defendants as to the futures trading.

We must conclude that the sales contract created no fiduciary duty on the part of GWS and none arose from the practices followed by the parties. The trial court should have granted the motion of defendants for a directed verdict on this claim. Both parties moved for a directed verdict on this issue.

As mentioned, the decisions in oil and gas cases in comparable situations hold that a fiduciary duty is not created. *See 19th Oil and Gas Institute Southwest Legal Foundation,* 165 at 179; *Garfield v. True Oil Co.,* 667 F.2d 942 (10th Cir.); *Craig v. Champlin Petroleum Co.,* 435 F.2d 933 (10th Cir.). There is nothing in the contract to create a fiduciary duty or confidential relationship. GWS, as mentioned, had no property of the plaintiffs nor was it "handling" property of the plaintiffs.

Special interrogatories were used and the jury was asked to answer on the three basic claims and to assess damages. The jury so found for defendants on the breach of contract claim, as mentioned. It found for plaintiffs on the claim of breach of an implied duty of good faith in the performance of the contract by GWS, and it found for plaintiffs on the claim of a breach of fiduciary duty.

Before the case went to the jury the parties stipulated that if the jury found for the plaintiffs on more than one claim the court in the entry of judgment would not add

the amounts but instead would enter judgment for the largest actual damage figure found by the jury on any claim. The jury awarded actual damages of $11,813,748 for the plaintiffs on the claim of breach of good faith and $11,459,335 on the fiduciary duty claim. The jury also awarded punitive damages against each defendant.

We have mentioned the disposition which must be made of the fiduciary duty claim. The jury decided the bare contract claim. There remains the claim based on a breach of the duty of good faith implied from the contract. This is the only surviving claim.

The plaintiffs under the good faith claim assert that the sugar was not sold at the best times in the sales year especially during periods of price declines. They also assert that there were delays in the execution of sales decisions imposed by the individual defendants.

The trial was necessarily a mixture of evidence on good faith and fiduciary duty. With the fiduciary duty claim excluded as it must be it is not possible to now consider the good faith claim separately. There is an additional problem arising from the trial court's instructions as to the measure of damages to be applied on the good faith claim. This instruction must be held to be in error. It advised the jury that it "may consider, among other things," the profits of GWS in its futures trading in the assessment of damages on the good faith claim. The use of "trading profits" as a factor in such damages introduced an extraneous factor — an erroneous element — in the determination as to what was necessary to place the damaged party in as good a position as he would have been had there been no breach of the implied good faith duty. *A to Z Rental, Inc. v. Wilson,* 413 F.2d 899 (10th Cir.) (applying Colorado law); *Intermountain Rural Elec-*

tric Ass'n v. Colorado Central Power Co., 322 F.2d 516 (10th Cir.).

The trading profits element was advanced as part of the breach of contract claim as to which the jury found against plaintiffs. It was not advanced as part of the implied good faith claim and was in fact no part of it. This was not a breach of fiduciary duty claim where such a special measure may be used. *Wilshire Oil Co. of Texas v. Riffe,* 381 F.2d 646 (10th Cir.); *Page v. Clark,* 197 Colo. 306, 592 P.2d 792.

In Colorado a definite distinction is made between contract and tort actions. There is no cause of action in tort for the breach of an implied duty under a contract. *Bloomfield Financial Corp. v. Nat'l Home Life,* 734 F.2d 1408 (10th Cir.). Tort recovery was denied in *Davis Cattle Co. v. Great Western Sugar Co.,* 544 F.2d 436 (10th Cir.).

There is an added uncertainty created by the jury in its award of damages. It appears, and both parties seem to acknowledge, that it added damages from the second and third claims. It is not possible to determine the result the jury intended. We pointed out this problem in our prior opinion. 696 F.2d 87. At this late date this uncertainty cannot be resolved on this substantial point by any reference to the original jury. There must be a new trial on the good faith claim.

On remand the trial court will have an opportunity to also reexamine the limitations and the pre-judgment interest issues. There exists under Colorado law, which makes a clear distinction between tort and contract claims, no basis for an award of punitive damages in a contract action absent the most egregious circumstances.

The Commodity Exchange Act issue was properly eliminated from the case by the ruling of the trial court.

The trial court permitted prejudgment interest on the basis that it would be permitted under Colorado law for a breach of a fiduciary duty. In view of our holding on the fiduciary duty claim the award of prejudgment interest must be set aside.

We hold that at the time the case was commenced the court had jurisdiction. An adjustment of the dollar figures during the proceedings did not divest the court of jurisdiction.

Upon close scrutiny there is nothing to show that the punitive damages claim was not made in good faith under *St. Paul Mercury Indemnity co. v. Red Cab Co.*, 303 U.S. 283, 58 S.Ct. 586, 82 L.Ed. 845; *Palmer v. A.H. Robins Co., Inc.*, 684 P.2d 187 (Colo.).

We conclude that the alter ego determination made as to defendants other than GWS was supported by the evidence.

The case must be remanded for a new trial only on the implied duty of good faith claim in accordance with this opinion. The judgments are set aside and the case is remanded for further proceedings in accordance with this opinion.

APPENDIX A-3

JANUARY TERM — February 12, 1986

Before Honorable William J. Holloway, Jr., Honorable Oliver Seth, Honorable James E. Barrett, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephen H. Anderson, Honorable Deanell R. Tacha and Honorable Bobby R. Baldock, Circuit Judges.

W.C. AND KENNETH STREY, etc.,
Plaintiffs, Appellees, Cross-Appellants,

v.

HUNT INTERNATIONAL RESOURCES CORPORATION, etc., et al.,
Defendants, Appellants, Cross-Appellees.

Nos. 84-1344 and 84-1398

The Court has before it the petition for rehearing with suggestion for en banc consideration filed by appellees/cross-appellants W.C. and Kenneth Strey. Judge Breitenstein's death and Judge Doyle's assumption of inactive status has left only one judge of the original panel, Judge Seth, who could vote on the rehearing petition. Judge Seth has voted to deny rehearing.

In order to make a proper disposition of the rehearing motion, the court on its own motion submitted the petition for rehearing to a written poll of all the judges in regular active service on the court, except Judge Seymour

and Judge Moore, who did not participate. All judges voted to deny rehearing.

Therefore, by order of the en banc court, the petition for rehearing is denied.

HOWARD K. PHILLIPS, Clerk

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On May 13, 1986, I served the within Petition for Writ of Certiorari in re: "Hunt International Resources Corporation v. W. C. & Kenneth Strey" in the United States Supreme Court, October Term 1985, No. .....;

on the Parties in said action, by placing 3 copies thereof enclosed in a sealed envelope with postage prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

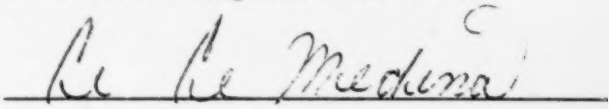
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All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on May 13, 1986, at Los Angeles, California



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(2)

No. 85-1884

Supreme Court, U.S.
FILED
JUN 17 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1985

HUNT INTERNATIONAL RESOURCES CORPORATION, GREAT WESTERN UNITED CORPORATION, THE GREAT WESTERN SUGAR COMPANY, WESTERN INVESTMENT COMPANY, N. BUNKER HUNT and W. HERBERT HUNT,

Petitioners,

vs.

W. C. and KENNETH STREY, a partnership on behalf of itself and all others similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Where the district court determines not only that a plaintiff's prayer for punitive damages was made in good faith but that the prayer was valid and in fact upholds a jury award of substantial punitive damages, and the Court of Appeals agrees that the punitive damages prayer was made in good faith but determines that the claim on which the prayer of punitive damages was based is invalid, was the Court of Appeals correct in refusing to oust the district court of jurisdiction over the claims of part of the class in a new trial on remand?

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IN THE

Supreme Court of the United States

October Term, 1985

No. 85-1884

HUNT INTERNATIONAL RESOURCES CORPORATION, GREAT WESTERN UNITED CORPORATION, THE GREAT WESTERN SUGAR COMPANY, WESTERN INVESTMENT COMPANY, N. BUNKER HUNT and W. HERBERT HUNT,

Petitioners,

vs.

W. C. and KENNETH STREY, a partnership on behalf of itself and all others similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The respondent W. C. and Kenneth Strey, on behalf of the approximately 3,500 similarly situated sugarbeet growers it represents, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Tenth Circuit's opinion in this case. That opinion is reported at 749 F.2d 1437 (10th Cir. 1984).

STATEMENT OF CASE

Respondent is a father-son Nebraska farming partnership. It is one of approximately 3,500 growers that entered into a standard-form 1974 Sugarbeet Contract with petitioner The Great Western Sugar Company ("GWS"), and represents all GWS growers in a five-state area in this class action. The Contract at issue in this case is a unique, "participating" contract in which the growers produce beets at their own expense and deliver them to GWS. GWS refines the beets into sugar at its own expense, and GWS then sells the sugar as it sees fit. Under the Contract, the growers receive approximately 62% and GWS approximately 38% of the "net return" from the sale of the sugar. The parties stipulated below that total control over selling the sugar is vested in GWS—the growers have absolutely no ability to influence or control the marketing process. Once the grower delivers his beets to GWS, he is totally dependent on GWS to act in good faith to get the highest possible net return for the sugar. Indeed, GWS stipulated before trial that it had a duty to respondent (and all growers) to act in good faith in performance of the 1974 Sugarbeet Contract.

Beginning in January 1975, GWS, under the direct and active supervision of petitioners Herbert and Bunker Hunt, began using a $10 million fund to establish large "short" positions in the sugar futures market,[1] which were initially described as "hedges" of GWS's sugar inventory. Between January and June of 1975, GWS and a subsidiary to which

[1] A "short" position is the selling side of an open futures contract. A short position becomes profitable when the price of the futures contract moves lower than the initial sale price; a short position becomes unprofitable when the price of the futures contract moves higher than the initial sale price.

it transferred GWS sugar futures positions realized over $61 million in net profits as a result of the short sugar futures transactions due to the drastic decline in sugar prices during the period.

At the same time, the Hunts were directly controlling the sales and marketing of the sugar inventory of GWS, despite a complete absence of any prior experience or expertise in the marketing of sugar. As a result of the control by the Hunts, GWS (which the year before had the second highest net return of any beet sugar company in the United States) finished dead last among all sugarbeet companies in the United States in the average price received for sugar in 1974-75, at a loss to the growers in excess of $17 million when compared to a close competitor.

This class action suit was filed in the United States District Court for the District of Colorado in May 1978. The growers premised federal question jurisdiction under 28 U.S.C. §§ 1331 and 1337 on their claim that defendants' conduct violated the antifraud provisions of the Commodities Exchange Act, 7 U.S.C. § 6b. The growers also alleged diversity jurisdiction under 28 U.S.C. § 1332 for various state law claims. After approximately two years of proceedings, the district court dismissed the growers' Commodities Exchange Act claim on the ground that there was no private right of action under the Act. Subsequently, the district court (in accordance with the dictates of *Zahn v. International Paper Co.*, 414 U.S. 291 (1973)) certified a class of all growers with over $10,000 in controversy when taking into account the punitive damages prayer. The district court at that time determined that the punitive damages prayer had a sufficient basis in law and fact and accordingly rejected defendants' vociferous contentions that

the prayer for punitive damages was made in bad faith solely for the purpose of acquiring federal jurisdiction. (Appendix A-1-1).

In a subsequent mandamus proceeding by which defendants sought unsuccessfully to have the class of growers decertified, defendants did not challenge the district court's inclusion of the punitive damages prayer for purposes of determining jurisdiction or certifying the class. Thereafter, the district court determined that the punitive damages prayer was sufficiently meritorious to warrant submission to the jury, and the jury in fact awarded substantial punitive damages of approximately $13.6 million after a four week trial.

At trial, the growers asserted various claims related to the sugar futures trading and the sales and marketing of sugar during 1975. First, the growers contended that the sugar futures trades, if "hedges" of the sugar inventory, served to establish the price of the sugar and that the $61 million from the hedge positions should have been included in calculating the average net return, with the result that the growers would have received 62% of the profits (some $38 million). The jury decided against the growers on this issue.

Second, the growers argued that GWS breached a duty of good faith owed to the growers in connection with the sales and marketing of sugar. The growers argued, among other things, that if the sugar futures trades were speculations or were for the sole account of defendants, then a conflict of interest existed. Contrary to petitioners' suggestion, this claim was not in essence that GWS merely had not sold the refined sugar at the best times of the year. Rather, since it was the undisputed obligation of GWS to

secure the highest price possible for the sugar inventory on behalf of the growers, and since it was also undisputed that the short positions became profitable only in the event of significant and substantial declines in sugar prices, the growers argued that the short sugar futures positions created an inherent conflict of interest whereby the defendants' huge financial interest in *lower* prices compromised their good faith duties to the growers to receive higher prices for the sugar inventory—the defendants just didn't care if the prices went down. In addition, the growers pointed to the Hunts' interference with the marketing of sugar, the Hunts' holding up price changes until they finished trading futures, the loss of sales during early 1975 when prices were high due to the Hunts' interference with marketing decisions, the refusal of the Hunts to permit the head of marketing to hedge the inventory himself, and other matters. The jury found that GWS had breached its good faith duties, and awarded the growers damages of $11.8 million for this claim.

Third, the growers argued that GWS's unfettered discretion and control over the sale and marketing of sugar, the fact that 62% of the net return from the sugar was payable to the growers and the fact that the sole means by which the growers could be paid for their beets was the marketing efforts of GWS, gave rise to a fiduciary or confidential duty owed by GWS to the growers in connection with the sale and marketing of sugar. The growers alleged that this duty existed and that it was breached, and further alleged that defendants' bad faith, their misrepresentations to the growers, their pre-litigation threats to "spend the growers to death" and other conduct warranted the imposition of substantial punitive damages. The jury found that a confiden-

tial or fiduciary duty was owed, that the duty was breached, and awarded actual damages of $11.4 million. The jury also found that the breach was such as to warrant punitive damages beyond a reasonable doubt (the standard of proof under Colorado law), and assessed a total of $13.6 million in punitive damages.

The growers also sought to impose liability upon defendants other than GWS through the alter ego doctrine. The jury found that all of the other defendants, most notably the Hunts, were liable to the growers under the alter ego or instrumentality theory. On post-trial motions, the trial court refused to set aside any of the jury's findings.

On appeal, the Tenth Circuit concluded that the Sugarbeet Contracts were "typical sales contracts" that "are not unusual." 749 F.2d at 1439 (Appendix A-2-2). The court, substituting its view of the evidence for that of the jury, held that "the contract provisions do not create a fiduciary duty and the evidence showed that none otherwise existed." 749 F.2d at 1440 (Appendix A-2-4). It concluded that the trial court should have granted a directed verdict for the defendants on the fiduciary duty issue, despite the fact that the defendants did not properly move for a directed verdict. The court, having reversed the jury's findings of the existence and breach of the fiduciary duty, also reversed the related awards of punitive damages and prejudgment interest.

The Tenth Circuit was careful, however, to reject defendants' argument that the prayer for punitive damages was made in bad faith and therefore could not be counted for purposes of determining subject matter jurisdiction. It agreed with the district court that the prayer for punitive damages had been made in good faith and ruled that its

own holding regarding the invalidity of the breach of fiduciary duty claim, which the growers had no reason to forsee at the time they filed suit, was not grounds to oust the jurisdiction of the district court over the trial on remand. 749 F.2d at 1441 (Appendix A-2-8).[2] Defendants never argued —and the Tenth Circuit never held—that to a legal certainty punitive damages were not recoverable in this action. Nor did defendants seek rehearing before the Tenth Circuit to raise the issue asserted, for the first time, in their petition for a writ of certiorari after the refusal of the punitive damages award.

The Tenth Circuit remanded the action for a new trial on the breach of contract claim, which is presently scheduled for March 1987. The growers' timely petition for rehearing and rehearing en banc on the breach of fiduciary duty and the remand issues, filed in December 1984, was not denied until February 1986.

REASONS FOR DENYING THE WRIT

THE DECISION OF THE TENTH CIRCUIT CORRECTLY APPLIED THE APPLICABLE LONG-STANDING DECISION OF THIS COURT AND IS IN ACCORD WITH THE DECISIONS OF OTHER CIRCUITS ON AN ISSUE THIS COURT HAS ALREADY ADEQUATELY ADDRESSED.

With rhetoric which betrays a lack of careful analysis, petitioners urge the Court to grant certiorari in order to rescind the open invitation allegedly extended by the Tenth Circuit to use invalid punitive damages claims as a basis for diversity jurisdiction. According to petitioners, the

[2]The court also affirmed the decision below regarding the liability of all defendants other than GWS for the conduct in question as mere alter egos or instrumentalities. 749 F.2d at 1441 (Appendix A-2-8).

Tenth Circuit has misapplied the Court's precedents and is in conflict with the decisions of other Courts of Appeals. Neither allegation is true. The Tenth Circuit correctly applied this Court's teaching on an issue it fully and adequately considered and decided almost fifty years ago. Moreover, the decision of the Tenth Circuit is in accord with the decisions of other circuits. Even the premise on which the petition rests—that the Tenth Circuit determined to a legal certainty that the growers cannot recover punitive damages in this action—is not true. Simply put, floodgates to unwarranted diversity actions have not been opened by the Tenth Circuit and are not at issue here. Accordingly, the Court should deny the petition for a writ of certiorari.

I.

The Tenth Circuit Correctly Applied The Rule Of *St. Paul Mercury*

Petitioners' contentions are based on a substantial misapprehension of the controlling standards set forth by the Court in *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283 (1938), and consistently and fairly applied by the Court and the lower courts on numerous occasions since. Contrary to petitioners' suggestion, the Court in *St. Paul Mercury* did not adopt a rigid rule requiring the dismissal of every action in which it is found at some point subsequent to filing that the plaintiff will not recover the requisite amount in controversy. Instead, the Court established a standard which focuses on the good faith of the plaintiff in making a claim sufficient to satisfy the amount in controversy requirement for diversity jurisdiction.

The Court in *St. Paul Mercury* began by acknowledging

that "[t]he intent of Congress drastically to restrict federal jurisdiction in controversies between citizens of different states has always been rigorously enforced by the courts." 303 U.S. at 288. The Court went on to hold, however, that

> [t]he rule governing dismissal for want of jurisdiction in cases brought in the federal court is that, unless the law gives a different rule, *the sum claimed by the plaintiff controls if the claim is apparently made in good faith.* It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal. *The inability of plaintiff to recover an amount adequate to give the court jurisdiction does not show his bad faith or oust the jurisdiction.*

Id. at 288-89 (emphasis added and footnotes omitted). The crucial issue in the determination is not the recoverability of certain damages but the good faith of the plaintiff at the initiation of the lawsuit in claiming such damages.

The good faith standard is not a toothless, subjective test. Indeed, the Court was careful in *St. Paul Mercury* to adopt objective criteria as the yardstick for determining whether the requisite good faith was present at the time the claim was made:

> But if, from the face of the pleadings, it is apparent, to a legal certainty, that the plaintiff cannot recover the amount claimed, or if, from the proofs, the court is satisfied to a like certainty that the plaintiff *never was entitled to recover that amount, and that his claim was therefore colorable for the purpose of conferring jurisdiction,* the suit will be dismissed.

Id. at 289 (emphasis added and footnote omitted). In other words, the Court made it clear that while "[e]vents occurring subsequent to the institution of suit which reduce the

amount recoverable below the statutory limit do not oust jurisdiction," *id.* at 289-90 (footnote omitted), if it is found that the facts and the law indicated to a legal certainty *at the time the action was brought* that the damages claimed could never be recoverable, then it can be said as a matter of law that the claim was not made in good faith, was "colorable" for the purpose of conferring jurisdiction and therefore should be dismissed.

As is readily apparent from the above-quoted passages, the suggestion by petitioners that "[r]esort to a 'good faith' assessment is thus necessary only when 'legal certainty' is not present," Petition at 9, is a substantial misrepresentation of the standard so carefully crafted by the Court in *St Paul Mercury*. "Legal certainty" that a particular category or amount of damages is not recoverable is not the end of the determination, but rather is merely one method by which a plaintiff's good faith in asserting that a certain amount is in controversy can be determined. Subsequent decisions of the Court adhere to this analysis. *E.g., Horton v. Liberty Mutual Ins. Co.*, 367 U.S. 348, 353 (1961) ("The general federal rule has long been to decide what the amount in controversy is from the complaint itself, unless it appears or is in some way shown that the amount stated in the complaint is not claimed 'in good faith' "); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 642 n.10 (1975) (reaffirming test as articulated in *St. Paul Mercury*).

Petitioners have never denied that punitive damages are includable in determining whether the amount in controversy requirement has been met, nor could they. *Bell v. Preferred Life Assurance Society*, 320 U.S. 238, 240 (1943). Similarly, petitioners have never denied that punitive damages may be recovered under Colorado law for a

breach of fiduciary duty. *Holter v. Moore & Co.*, 681 P.2d 962, 966 (Colo. App. 1983); *White v. Brock*, 584 P.2d 1224 (Colo. App. 1978). The only issue for the Tenth Circuit therefore was whether the breach of fiduciary duty and punitive damages claims were made in good faith.[3] The relevant portion of its decision, although brief, demonstrates that it fully considered the issue and correctly applied the *St. Paul Mercury* standard:

> We hold that at the time the case was commenced the court had jurisdiction. An adjustment of the dollar figures during the proceedings did not divest the court of jurisdiction.
>
> Upon close scrutiny there is nothing to show that the punitive damages claim was not made in good faith under *St. Paul Mercury* . . . .

749 F.2d at 1441 (citations omitted) (Appendix A-2-8). By no stretch of the imagination was the Tenth Circuit's ruling "an open invitation for plaintiffs to use legally invalid punitive damage claims to 'shoehorn' their state law actions into federal court," as petitioners would have the Court believe. Petition at 14. Petitioners' insistence otherwise derives from both excessive advocacy and a flawed understanding of *St. Paul Mercury*.

As the Tenth Circuit recognized, the rationale underlying

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[3]Significantly, petitioners no longer assert, as they did in the district court and before the Tenth Circuit, that the punitive damages claim was not made in good faith. Instead, they now argue, for the first time, that the determination by the Tenth Circuit (seven years after the action was filed) that the breach of fiduciary duty claim was invalid must as a matter of law divest the district court of jurisdiction. In essence, petitioners are attempting to rewrite the rule of *St. Paul Mercury* so that legal certainty, at whatever point determined, makes objective good faith at the time of filing the action irrelevant—an issue never raised below. The petition could be denied on this basis alone.

this Court's reasoning in *St. Paul Mercury* is especially applicable to the circumstances of this action. Where a claim has been asserted in objective good faith, considerations of judicial economy and fairness to the parties dictate that the action not be dismissed if it is determined at some later point that plaintiff cannot recover an amount sufficient to satisfy the amount in controversy requirement. The district court here not only determined that the prayer for punitive damages was made in good faith (and therefore would be counted for purposes of satisfying the amount in controversy requirement), but also submitted the claim to the jury, which awarded $13.6 million in punitive damages. What could be better evidence of the growers' good faith than that both the district court and the jury found the fiduciary duty and the punitive damages claims to be valid?

It was not until six years after the punitive damages claim was alleged that the Tenth Circuit, reviewing the claim on appeal, first held that the breach of fiduciary duty claim was invalid. Even then, however, the Tenth Circuit, after "close scrutiny," 749 F.2d at 1441 (Appendix A-2-8), found that respondent's breach of fiduciary duty and punitive damages claims were asserted in good faith. The Tenth Circuit correctly recognized that the fact that it had declared the breach of fiduciary duty claim invalid did not of necessity mean that the invalidity of that claim was apparent to a legal certainty at the time the growers initiated this action.[4] Moreover, the Tenth Circuit certainly recognized the incalculable advantages in economy and fairness

[4]It should be noted as well that the growers asserted a federal question claim under the Commodities Exchange Act which conferred jurisdiction without regard to the amount in controversy. The existence of this claim is another indication that the punitive damages claim was not made solely to confer jurisdiction.

of having the case retried before the same Judge and under the same procedural and evidentiary rules. *Cf. Rosado v. Wyman,* 397 U.S. 397, 403-05 (1970) (no reason to defeat the commonsense policy of pendent jurisdiction by requiring jurisdiction over primary claim at all stages as a prerequisite to resolution of pendent claims); *Cenco v. Seidman & Seidman,* 686 F.2d 449 (7th Cir.) (where federal claim dismissed on appeal, considerations of judicial economy which underlie pendent jurisdiction doctrine support retention of pendent state claims for retrial before same judge), *cert. denied,* 459 U.S. 880 (1982). Indeed, since many class members (including respondent) had the requisite amount in controversy without counting any punitive damages claim, this action will continue in federal court regardless of the jurisdictional ruling. Under these circumstances, it would hardly be sound management of judicial resources to force the maintenance of five parallel suits in state courts by "ousted" class members.

II.

The Decision Of The Tenth Circuit Is In Accord With The Decisions Of Other Circuits

The decisions of other Courts of Appeals are in accord with the Tenth Circuit in their application of the rule of *St. Paul Mercury,* as evidenced by the cases cited by petitioners. Indeed, those cases uniformly rely on an objective determination, using the criteria set forth in *St. Paul Mercury,* of whether the plaintiff was in good faith in making the disputed claim. *See, e.g., Wiggins v. North American Equitable Life Assurance Co.,* 644 F.2d 1014, 1017 (4th Cir. 1981) ("the legal impossibility of recovery must be so cer-

tain as virtually to negative the plaintiff's good faith in asserting the claim"); *Burns v. Anderson,* 502 F.2d 970 (5th Cir. 1974) (holding that dismissal by district court was proper because claim could not have been made in good faith); *Nelson v. Keefer,* 451 F.2d 289, 292 (3d Cir. 1971) (holding that dismissal is proper only in "flagrant cases" where it can be determined *in advance* to a legal certainty that the amount in controversy requirement cannot be satisfied); *McDonald v. Patton,* 240 F.2d 424, 426 (4th Cir. 1957) ("If the right of recovery is uncertain, the doubt should be resolved, for jurisdictional purposes, in favor of the subjective good faith of the plaintiff").

Good faith has been found lacking only in circumstances where it was clear at the time the claim was made that it was legally or factually invalid. *See, e.g., Morris v. Hotel Riviera, Inc.,* 704 F.2d 1113 (9th Cir. 1983) (statute on its face limited recovery to less than $10,000); *Wood v. Citronelle-Mobile Gathering System Co.,* 409 F.2d 367 (5th Cir. 1968) (punitive damages unavailable because of collateral estoppel effect of prior state court ruling and state law precluding such damages in breach of contract actions); *Nixon v. Loyal Order of Moose Lodge No. 750,* 285 F.2d 250 (4th Cir. 1966) (damages provision of written contract limited recovery to less than $10,000). In similar circumstances the Tenth Circuit has also found good faith to be lacking. *See, e.g., Kalpakian v. Oklahoma Sheraton Corp.,* 398 F.2d 243 (10th Cir. 1968) (statute limited recovery).

In many of the cases cited by petitioners, the district court itself found good faith to be lacking and dismissed the action prior to trial. *See, e.g., Kahal v. J. W. Wilson & Associates, Inc.,* 673 F.2d 547 (D.C. Cir. 1982) (affirming

dismissal by district court because as a matter of law facts pleaded insufficient to support award of punitive damages); *Burns v. Anderson*, 502 F.2d at 972 (affirming dismissal by district court because clear that original claim could not have been made in good faith). Even in *Zahn v. International Paper Co.*, with which petitioners suggest the Tenth Circuit's ruling was at odds, the district court had held at the class certification stage that it was convinced to a legal certainty that not every class member had suffered damages in excess of $10,000. 414 U.S. at 292. By contrast, the district court here applied the legal certainty test, determined that the breach of fiduciary duty claim and the prayer for punitive damages were brought in good faith, and subsequently agreed that the claims were in fact valid.

None of the cases cited by petitioners has held that it is improper under *St. Paul Mercury* to remand an action for retrial where, as here, a claim which was originally brought in good faith is later determined to be invalid. *Cf. Rosado v. Wyman*, 397 U.S. at 405 n.6 (commonsense policy of pendent jurisdiction is "persuasive analogy" to "well-settled" rule of *St. Paul Mercury*).[5] The case law holds uniformly that so long as the initial claim was made in good faith, as measured by the *St. Paul Mercury* standard, the absence of the potential on retrial to recover the jurisdictional

[5]Although the court below did not base its decision on the doctrine of pendent jurisdiction, it is clear that because respondent's claim under the Commodities Exchange Act was not plainly insubstantial the district court had the power to exercise pendent jurisdiction over the remaining state law claims after dismissal of the CEA claim. *See Rosado v. Wyman*, 397 U.S. at 403-05. The same factors of judicial economy and fairness to the litigants central to the *St. Paul Mercury* rule would militate in favor of the exercise of jurisdiction over all class members in the retrial of this case under the doctrine of pendent jurisdiction.

amount does not defeat jurisdiction to retry the remaining claims. In sum, the Tenth Circuit and other lower courts have correctly applied the rule that once the district court has specifically found that the claim was brought in good faith, jurisdiction attaches and is not ousted by subsequent rulings unless and until the district court's finding of good faith is specifically reversed.

III.

The Tenth Circuit Was Never Asked To—And Did Not —Determine To A Legal Certainty That The Growers Cannot Recover Punitive Damages

Wholly aside from the issue of the growers' good faith in asserting the breach of fiduciary duty claim and the punitive damages prayer, the writ should be denied because the premise on which the petition rests—that it has been "determined to a legal certainty that a plaintiff cannot recover punitive damages"—simply is not true. Petitioners never directly asked the Tenth Circuit to declare that to a legal certainty punitive damages were never recoverable in this action under any theory. In fact, the Tenth Circuit was quite careful to indicate that Colorado law may allow punitive damages in those contract actions involving "egregious circumstances." 749 F.2d at 1441 (Appendix A-2-7). Indeed, the Colorado Supreme Court presently has pending before it a case requiring it to decide the extent to which punitive damages may be recovered in a breach of contract action. *Podleski v. Mortgage Finance, Inc.*, 709 P.2d 19 (Colo. App.), *cert. granted*, (Colo. Nov. 4, 1985) (No. 85-264). Given the evidence at the first trial of the defendants' malice, insult and wanton and reckless disregard of the

growers' rights and feelings, and the jury's findings, it is likely that the growers may be able on retrial to establish sufficiently egregious circumstances to justify an award of punitive damages. *See Bell v. Preferred Life Assurance Society*, 320 U.S. at 242 (under applicable state law it could not be said to a legal certainty that sufficient punitive damages were not recoverable). Indeed, respondent has already advised the district court and petitioners that it will seek punitive damages upon the retrial of this case.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

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Respectfully submitted,

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